

DISCUSSION OF REAFFIRMATION AGREEMENTS

Effect of Reaffirming a Debt. If a debtor enters into an agreement to reaffirm a debt and that agreement meets the requirements of [11 U.S.C. § 524\(c\)](#) to be effective, the debtor will be personally liable for the debt even though the debtor has received a discharge. In other words, not only can the creditor proceed against any collateral securing the debt, but the creditor can collect the debt from the debtor directly:

Illustration. If a car lien creditor repossesses the debtor's car, the creditor's resale of the car often will be for less than the retail value of the car, and yield insufficient proceeds to cover the outstanding debt. For example, if a car lien creditor repossesses and sells the debtor's car for \$11,000, leaving \$9,000 of a \$20,000 debt unpaid, the creditor can utilize remedies available under nonbankruptcy law to collect the \$9,000 balance of the debt as a personal liability of the debtor. Such remedies include obtaining a judgment against the debtor, and using execution process to collect that judgment (for example, obtaining a writ of garnishment against the debtor's wages). If the debtor had *not* reaffirmed the debt, the creditor would be barred from collecting the \$9,000 balance as a personal liability of the debtor.

As discussed below, a debtor should think very carefully before reaffirming a debt.

Reaffirming a Debt When the Debt is Secured by a Lien on Property of the Debtor. Even when the creditor has a lien against property of the debtor that the debtor wishes to retain, and the debtor is worried that without reaffirmation the creditor may enforce its lien, reaffirmation of the debt may not be in the debtor's best interest:

- The collateral may be worth far less than the debt, or there may be a risk that the debtor will be unable at some point to afford to make the payments.
- Sometimes a creditor may decide not to enforce its lien against collateral securing the debt (even though the debtor does not reaffirm the debt) so long as the debtor is remaining current on the debt.

Illustration. If the collateral is a car worth \$10,000 securing a debt for \$15,000, the creditor may decide that it will fare better to let the debtor keep the car so long as payments are kept current.

To help persuade the creditor to not enforce its lien, the debtor may choose to seek entry of an order that would give the creditor some assurances that it will fare better not enforcing its lien if payments are kept current. In this regard, see the following decisions for an illustration of how the court has addressed certain reaffirmation agreements:

[In re Brown](#), Case No. 08-00712, 2009 WL 150630 (Bankr. D.D.C. Jan. 21, 2009)

[In re Morgan](#), Case No. 08-00176, 2008 WL 2705205 (Bankr. D.D.C. July 7, 2008) (attaching an example of an *Order Imposing, with the Debtor's Consent, Unilateral Obligations On the Debtor for the Protection of the Secured Creditor*)

- Sometimes a secured creditor may realize that its collateral is not worth as much as the debt, and that upon repossession it will net a relatively small amount. On the other hand, the debtor may realize that to replace the collateral if it were repossessed would cost more than what the creditor would net. Such circumstances can lead to negotiated terms for a reaffirmation agreement (reaffirming a lesser amount of debt than the current debt) that leaves both the debtor and the creditor better off than if the creditor repossessed the collateral.
- Sometimes a secured creditor may be willing to reaffirm at a more affordable interest rate if the debtor cannot afford to make payments at the existing interest rate.

Alternative of Redeeming Property. An individual debtor in a chapter 7 case may redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt by paying the lienholder the full amount of the lienholder's allowed secured claim (based on the value of the property). [11 U.S.C. § 722](#). Some lenders will make postpetition loans to a debtor based on the current value of the collateral to enable a debtor to redeem the collateral (for example, an automobile) from the lien of a prior lender. Or a debtor may be able to obtain assistance from relatives or friends to accomplish a redemption. If the collateral is worth less than the debt, or the interest rate on the existing debt is high, redemption of the collateral may be a more attractive option than reaffirming the debt (or, even though any new loan utilized to effect the redemption will be a debt for

which the debtor is personally liable, it may be a better outcome than not reaffirming the debt but continuing to pay the existing debt). If a debtor communicates that he intends to redeem the property rather than reaffirm the debt on its current terms, the lienor may be willing to agree to more favorable reaffirmation terms.

Reaffirming a Debt as a Moral Obligation. If the debtor feels a moral obligation to repay a particular debt, there is no need to reaffirm the debt in order to comply with that moral obligation. Under [11 U.S.C. § 524\(f\)](#), a debtor may voluntarily repay a debt even though the debt was not reaffirmed.

Rescission. The debtor may rescind (walk away from) the reaffirmation agreement at any time prior to discharge or within sixty days after the agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of the claim. [11 U.S.C. § 524\(c\) \(4\)](#).

Basic Requirements for an Effective Reaffirmation Agreement. To put into place a reaffirmation agreement, the debtor and creditor execute a written agreement along the lines of the suggested [Reaffirmation Agreement form](#). Then either the debtor or the creditor files the reaffirmation agreement by mailing it or delivering it to the clerk's office.

The following are requirements for a reaffirmation agreement to be effective:

(1) the reaffirmation agreement must be made before the granting of the discharge;

(2) the reaffirmation agreement must comply with the disclosures required by [11 U.S.C. § 524\(k\)](#) (elicited by the suggested [Reaffirmation Agreement form](#));

(3) if the debtor was represented by an attorney in the course of negotiating the agreement, the attorney must execute Part C of the Reaffirmation Agreement;

(4) if the debtor was not represented by an attorney in negotiating the agreement, the debtor must appear in person at a hearing at which the court gives the debtor certain information, and (unless the debt is a consumer debt secured by real property) the court must enter an order approving the reaffirmation agreement ([11 U.S.C. § 524\(c\) \(6\) and § 524\(d\)](#));

(5) the debtor must not have timely rescinded the agreement (see [Rescission](#), above);

(6) the debtor must comply with [Fed. R. Bankr. P. 4008\(b\)](#) (with the [Cover Sheet](#) (an Official Form effective December 1, 2009, but usable beforehand, and designed to

facilitate compliance with Rule 4008(b)); and

(7) if part D of the reaffirmation agreement raises a presumption of undue hardship under [11 U.S.C. § 524\(m\)](#) (because the debtor's monthly income is less than the debtor's monthly expenses), and the creditor is not a credit union, the agreement will not be effective if it is disapproved on the basis that the presumption of undue hardship has not been rebutted.

Deadline for Entering Into the Reaffirmation Agreement;
Deadline for Filing the Reaffirmation Agreement. Two different deadlines apply to reaffirmation agreements:

- Deadline for Making Reaffirmation Agreement. [Section 524\(c\) \(1\)](#) requires that the reaffirmation agreement be *made* before the grant of the debtor's discharge. The court has no discretion to enlarge that statutory deadline. But to the extent allowed by [Fed. R. Bankr. 4004\(c\) \(2\)](#), the court on motion of the debtor can defer the granting of the discharge in order to permit the reaffirmation agreement to be timely made before the discharge is granted.
- Deadline for Filing Reaffirmation Agreement. Under [Rule 4008](#), the reaffirmation agreement is required to be *filed* no later than 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341. The court has discretion to enlarge that time.

When a Hearing is Required. The court will hold a hearing on a reaffirmation agreement when either:

(1) the debtor was not represented by an attorney in the course of negotiating the agreement, or

(2) the reaffirmation agreement raises a presumption of undue hardship that the court feels warrants a hearing.

If the debtor was not represented by an attorney in the course of negotiating the agreement, the debtor must appear in person at the hearing in order for the reaffirmation agreement to be approved.

Delay of Discharge When a Presumption of Undue Hardship Has Arisen. When part D of a reaffirmation agreement raises a presumption of undue hardship under [11 U.S.C. § 524\(m\)](#), the discharge will not be issued so long as the presumption is in place. If the court does not earlier enter an order declaring that the presumption of undue hardship has been rebutted to the satisfaction of the court, the presumption lasts for 60 days after the reaffirmation agreement is filed (unless the court orders such 60-day period extended before it expires). If part D

of the reaffirmation agreement does not contain an explanation that rebuts the presumption of undue hardship to the satisfaction of the court, the court attempts to set a hearing (to be held before the presumption expires) to address whether to disapprove the reaffirmation agreement.

Creditor's Acceptance of Payments Under a Reaffirmation Agreement That Was or Becomes Ineffective. Two provisions address whether a creditor may accept payments under a reaffirmation agreement that becomes ineffective or that was ineffective from the outset:

- Under [11 U.S.C. § 524\(1\)\(1\)](#), a creditor may accept payments from a debtor before and after the filing of a reaffirmation agreement. Illustration: If the reaffirmation agreement was one that required court approval, and the reaffirmation agreement was later disapproved, the creditor was permitted to accept payments before such disapproval.
- Under [11 U.S.C. § 524\(1\)\(2\)](#), a creditor may accept payments from a debtor under an agreement "that the creditor believes in good faith to be effective." Illustration: If a creditor accepts payments for years under a reaffirmation agreement believing in good faith that it was effective, the creditor was permitted to accept those payments.

When either of those provisions permitted the creditor's acceptance of the payments, the acceptance of the payments will not have violated the Bankruptcy Code, and the ineffectiveness of the reaffirmation agreement will not entitle the debtor under the Bankruptcy Code to a return of those payments.

Remedies if the Creditor Attempts to Collect Pursuant to an Ineffective Reaffirmation Agreement. If a reaffirmation agreement is or becomes ineffective, and the debt is discharged, the discharge injunction of [11 U.S.C. § 524\(a\)\(2\)](#) (except as provided in § 524(1) as discussed above), bars the creditor from collecting the debt as a personal liability of the debtor (but the creditor may collect the debt as permitted by nonbankruptcy law from property on which it has a security interest or other lien securing payment of the debt). If the creditor attempts to collect the discharged debt as a personal liability of the debtor, and refuses to stop such collection efforts, the debtor's remedy is to pursue a motion to hold the creditor in civil contempt for violating the discharge injunction, and includes the right to recover sums collected in violation of the discharge injunction. The debtor may wish to employ counsel: if the creditor is held in civil contempt for violating the discharge injunction, part of the debtor's recoverable damages include

reasonable attorney's fees.

Caveat. The foregoing highlights certain aspects of
reaffirmation agreements, but should not be taken as constituting
legal advice. If you need legal advice regarding a reaffirmation
agreement, you should consult a duly licensed attorney.